

VIII. THE COMMISSION SHOULD CONDUCT AUCTIONS FOR EACH LICENSE AREA ON A CHANNEL-BY-CHANNEL BASIS BUT SHOULD NOT IMPOSE ANY CHANNEL AGGREGATION LIMIT

The Commission proposes to, "assign geographic licenses on a channel-by-channel basis."^{49/} MobileMedia supports this proposal to the extent area licensing is adopted. As the Commission has recognized, paging channels are not utilized in blocks. This is well shown by the current dearth of channel aggregation in paging markets.^{50/} A channel-by-channel auction process most closely matches the manner in which spectrum is utilized and, accordingly, should be adopted.

The Commission also seeks comment on whether it should impose some form of channel aggregation limit on paging frequencies alone or in combination with narrowband PCS capacity.^{51/} No such caps are necessary or appropriate. As noted above, the paging industry is fiercely competitive and current build-out requirements have, as a practical matter, prevented channel aggregation at a level presenting risks to competition. Moreover, as the Commission notes, "it is questionable whether allowing licensees to aggregate paging spectrum freely poses any risk of competitive harm."^{52/} Even setting aside competition from narrowband PCS, paging operations compete with broad-band PCS, other CMRS, broadcast, satellite and other Commission licensees that offer or are able to offer paging service to the public. In a marketplace where one broadcast license can aggregate up to five

^{49/} Notice, ¶ 68.

^{50/} *Id.* at ¶ 69.

^{51/} *Id.* at ¶¶ 68-70.

^{52/} *Id.* at ¶ 69.

200 MHz FM licenses (with the capacity to provide multiple paging services on each), there appears little, if any, risk that the aggregation of paging channels -- even with narrowband PCS -- could cause competitive harm that would not first be thwarted by the antitrust laws.

IX. THE COMMISSION SHOULD TAKE STEPS TO ASSURE THAT THIS PROCEEDING DOES NOT IMPAIR SERVICE TO THE PUBLIC OR THE INDUSTRY'S ABILITY TO COMPETE

A. The Freeze Should Be Lifted Immediately.

MobileMedia agrees with the vast majority of parties which filed comments in the Commission's interim proposal regarding its imposition of a freeze on applications for paging licenses. The FCC should continue to process all pending and new applications for channels which are not mutually exclusive with other applications. To the extent applications for channels are not mutually exclusive, there is no reason to impede processing other than to preserve such areas for the mutual exclusivity likely to be created by large-area licensing. As is discussed above, the Commission's auction authority does not support such an approach. Questions of legal authority aside, the freeze stands in the way of an industry growing at an annual rate of 35%. As coverage needs of paging companies change due to shifted populations and businesses, the paging industry's ability to gain licensing authorization to meet such needs has been halted. Paging companies have traditionally applied for additional site licenses as consumer demand has grown in a particular area; the freeze disrupts this efficient pattern and precludes needed service. Significantly, it does so at a time when paging is facing new competition on many fronts, including from broad-band

and narrowband PCS licensees. The freeze is, right now, causing a degradation of service to the public. It should be lifted immediately.

B. The Commission Should Modify Its Collusion Rules To Permit Continued Trading Activity for Existing Systems During The Auction.

The Commission has proposed its standard anti-collusion rules for any paging auctions.^{53/} These rules require that, prior to the auction, each applicant "certify 'under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to [Section 1.2105](a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid."^{54/} Although discussions that do not concern bidding strategy are permitted,^{55/} discussion and resulting agreements concerning the purchase and sale of existing communications systems in the same service as the auction have been held to necessarily affect bidding strategy and therefore have been prohibited.^{56/} "Prohibited communications also include negotiations with other applicants that are incumbent licensees (not identified in the short-form application) for

^{53/} See *id.* at ¶¶ 88-94.

^{54/} 47 C.F.R. 1.210(5)(a)(2)(ix) (1995). Amendments to this certification are, as a practical matter, prohibited. See 47 C.F.R. 1.2105(a)(2)(viii).

^{55/} See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858, 6869 (1994).

^{56/} See Letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to Jonathan D. Blake, Esq. (November 28, 1995); Letter from R. Allen, Acting Chief, Commercial Radio Division, to R.M. Senkowski (December 1, 1994) (discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

assignment or transfer of control of licenses for encumbered spectrum."^{57/} Thus, *any* merger or acquisition activity between two bidders that have indicated an intent to bid in the same market is prohibited. This is, in the context of a highly encumbered service such as paging, a case of the tail wagging the dog. Recent transactions in the paging industry have approached \$1 billion for a single deal. It is not accurate to assume that all such transactions would be collusive, nor from a commercial standpoint is it practical to put deal-making in a deep freeze for the duration of the auctions. As noted above, paging is a vibrant and rapidly growing industry. M&A activity is an important tool for meeting new and changing customer demands. Rather than rely on over-inclusive rules, the Commission should look to the antitrust laws, which incorporate strict and criminal prohibitions on collusive activity in auction settings, to prohibit inappropriate M&A activity.

C. The Commission Should Utilize Market-by-Market, Frequency-by-Frequency Stopping Rules To Speed The Auction Process and To Avoid Abusive Bidding Behavior.

As described above, the Commission's freeze on processing applications has harmed the ability of companies to grow their systems as quickly as possible to meet consumer demand. The auctions themselves, by their very length, figure to have much the same effect, and the Commission must design its auction rules to curtail such effects. In the *Notice*, the Commission proposes to use market-by-market stopping rules.^{58/} This presumes

^{57/} *In re Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Order*, MM Docket No. 94-131, PP Docket No. 93-253, DA 95-2292, at ¶ 6 (released November 6, 1995).

^{58/} *See Notice*, ¶ 83.

that the various frequencies available in a market are fungible, which from the perspective of a bidder is generally not the case. Instead, the Commission should adopt a market-by-market, frequency-by-frequency stopping rule, which will bring auctions to a prompt conclusion as bids for each frequency reach their maximum. As the PCS C-block auction demonstrates, a simultaneous stopping rule encourages abusive bidding practice whereby bidders simply "park" bids so as only to retain their eligibility and to prolong the auction.^{59/} While the prolonging of the C-block auctions for PCS does hinder the winning bidders from constructing their networks, such an effect would be even more harmful to would-be competitors in the already-mature paging industry. Simultaneous stopping rules also permit abusive bidding in encumbered services. Bidders with no intent of constructing a system bid up the price of spectrum surrounding that of an incumbent operator with the intent of artificially raising the price. This is a strategy with little risk, for, if the abusive bidder winds up the winner, the bidder's only loss is its deposit. A market-by-market, frequency-by-frequency stopping rule is more efficient than a simultaneous stopping one, for it will more rapidly send the party truly interested in a particular authorization on its way to constructing a system and thereby to competing with incumbent paging service providers.

X. CONCLUSION

Faced with a mutual exclusivity problem in the 931 MHz band, the Commission has proposed sweeping licensing changes for the entirety of the PCP and CCP

^{59/} See "C-Block Auction Surpasses Total Raised in A/B Block Auction in Round 39," *PCS Week* (March 6, 1996).

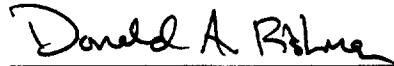
bands. Radical surgery is proposed where out-patient care is all that is required. The Commission should proceed with auctions on a site-by-site basis in the 931 MHz band. This is the only area where the Commission has proper authority to proceed with auctions. If area licensing is implemented anywhere, then it should be done using BTAs or smaller market-oriented areas and incumbent operators serving 70% or more of the population in the area should be granted that area license.

It is vital that the Commission take steps to assure that service to the public is not impeded and that the industry retains its ability to compete both as this matter proceeds and upon its conclusion. The application freeze should be lifted immediately; rules permitting the continuation of normal system trading activity during any auctions should be implemented; market-by-market, frequency-by-frequency stopping rules should be adopted; and the Commission should not impair the industry's ability to compete by imposing channel aggregation limits.

Paging is a vital, competitive industry that provides efficient, often critical -- sometimes life saving -- communications service. This successful enterprise is the product of the current site-based licensing plan. It would be reckless to depart from that plan without the assurance of meaningful benefits. None are apparent. Moreover, the only extant issue -- mutual exclusivity problems in the 931 MHz band -- can readily be solved by site-based

auctions. Accordingly, the Commission should reject the proposal to adopt area licensing for paging and utilize auctions solely to resolve applications that are mutually exclusive under its current rules.

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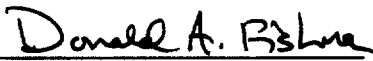
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